No. 89-1259

In The

Supreme Court of the United States

October Term, 1989

ULRICH HUYSSEN,

Petitioner,

v.

FIRST UNION MORTGAGE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

FRANCIS C. CLARK
LEGAL DIVISION
FIRST UNION CORPORATION
Two First Union Center
301 S. Tryon Street
Charlotte, N.C. 28288-0630
(704) 374-6611

Counsel of Record

KELLY WILKINSON
KEAN, MILLER, HAWTHORNE,
D'ARMOND, MCCOWAN
& JARMAN
P. O. Box 3513
Baton Rouge, Louisiana 70821
(504) 387-0999

Counsel for Respondent

February 28, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. In an Equal Credit Opportunity Act case in which the plaintiff claims he was denied a loan because of his national origin and religion, may the district court direct a verdict against a plaintiff who presents no evidence that he was qualified for the loan, that he was treated differently from any other applicant, or that the defendant's reason for denying the loan was pretextual?

2. Did the district court abuse its discretion by denying a new trial motion when the "newly discovered evidence" would not affect the outcome of the case and was readily available in pretrial discovery?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

STATUTES AND REGULATIONS

First Union Home Equity Corporation, formerly known as First Union Mortgage Corporation*, submits this Brief in Opposition to the Petition for a Writ of Certiorari received on February 2, 1990.

STATEMENT OF THE CASE

Petitioner, Ulrich Huyssen ("Huyssen"), is a German citizen, Christian minister, and self-employed businessman. In 1984 he applied for a $30,900.00 loan from the Baton Rouge, Louisiana office of First Union Home Equity Corporation ("First Union"). His loan application was denied by First Union's North Carolina home office because the ratio of his income to his debt repayment obligations was inadequate. In calculating Huyssen's income, First Union followed its then standard, conservative practice of treating depreciation shown on his tax returns as taxable, rather than non-taxable, income. Huyssen sued First Union under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, *et seq.*, for $1,500,000.00, claiming that First Union discriminated against him because he is a German and a Christian.

Huyssen presented a disparate treatment claim to the district court (Petition App. at 2h-3h). The parties stipulated that he is a German and a Christian and that he was denied a loan (Petition App. at 9h-10h). However,

* The respondent, First Union Home Equity Corporation, formerly known as First Union Mortgage Corporation, is a wholly-owned subsidiary of First Union National Bank of North Carolina, which is a wholly-owned subsidiary of First Union Corporation.

Huyssen presented no evidence either that he was qualified for the loan under First Union's standards or that he was treated differently from any other loan applicant. Huyssen based his case on his expert's testimony that, unlike First Union, the expert considered the depreciation on Huyssen's tax returns as non-taxable, rather than taxable, income in evaluating the loan application, and using this method Huyssen's income-to-debt ratio was sufficient to qualify him for the loan. He made no attempt to show that First Union's credit standards or treatment of depreciation somehow discriminated against Germans, Christians, or any other protected person.

At the close of all evidence, the district court directed a verdict against Huyssen, stating that the only thing he had proven was that his loan was denied. The district court found that the explanation for the loan denial offered by First Union had been totally unrebutted and unchallenged, other than by Huyssen's expert testimony which was "not of great benefit to the jury" (Petition App. at 2b).

After the trial in 1988, Huyssen approached a First Union office in Oklahoma under false pretenses and learned that First Union had begun treating depreciation as non-taxable income, a reversal of its earlier practice. First Union changed its treatment of depreciation over two years after denying Huyssen's application. Neither during discovery nor at trial did Huyssen ask whether First Union had changed its practice. Nevertheless, Huyssen moved for a new trial on the basis of this "newly discovered evidence." The district court denied the motion, finding that the "new evidence" was not

material, because the change of procedure occurred long after the plaintiff's loan application.

On appeal, the court of appeals summarily affirmed in an unpublished, *per curiam* opinion. *Huyssen v. First Union Mortgage Corp.*, No. 89-3232 (5th Cir. Oct. 18, 1989).

REASONS FOR DENYING THE WRIT

This case presents no basis for granting a Writ of Certiorari. The petitioner cites not a single reason included in Rule 10 to justify his petition. Perhaps this is understandable, because the court of appeals decision conflicts with no decision of this Court or any other court, did not depart from the accepted and usual course of judicial proceedings, and dealt only with settled federal law. Huyssen simply disagrees with the lower courts' determination that a jury should not be allowed to speculate on his claim when he presented absolutely no evidence of discrimination.

Furthermore, Huyssen now attempts to raise issues that he never presented to the district court. In the district court he never pursued a discrimination claim under the disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), never presented a breach of contract claim, and never argued that this case somehow involved the Seventh Amendment right to trial by jury.

I. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL COURT.

In Equal Credit Opportunity Act ("ECOA") and other discrimination cases, a plaintiff may present a claim under the disparate impact theory of *Griggs v. Duke Power Co.*, the disparate treatment theory under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or both. Huyssen stipulated that he was pursuing a disparate treatment claim (Petition App. at 9h-10h). In an ECOA disparate treatment case, a plaintiff may establish a prima facie case by presenting facts to support a reasonable inference that his credit application was rejected, more likely than not, because of unlawful discrimination. *Gross v. United States Small Business Admin.*, 669 F. Supp. 5053 (N.D.N.Y. 1987), *aff'd*, 867 F.2d 1423 (2d Cir. 1988). An ECOA disparate treatment case has four essential elements:

(1) The plaintiff is a member of a protected class;

(2) The plaintiff applied and was qualified for a loan;

(3) Despite his qualification, was rejected; and

(4) Persons of different national origin or religion of similar credit stature were treated more favorably by the creditor. *Gross, supra*, 669 F. Supp. at 53.

Huyssen failed to prove his case. In fact, the only elements Huyssen established were that he was a German and a Christian, and that his loan application was denied.

The crux of Huyssen's complaint seems to be that he disagrees with First Union's standards of creditworthiness. He offered evidence that, under standards different

from First Union's, he would qualify for a loan. This was the thrust of his expert's testimony. The ECOA, however, expressly recognizes creditworthiness as a legitimate creditor concern. 15 U.S.C. § 1691. Regulation B, the ECOA's implementing regulation, permits the use of subjective, non-discriminatory credit underwriting standards. 12 C.F.R. §§ 202.6(a), (b); 202.7(d). Huyssen simply refuses to accept the fact that his income was insufficient to pay his debt, under First Union's permissible standards.

Huyssen presented no evidence that he qualified under First Union's criteria. He presented no evidence about any other credit applicant, much less that anyone was treated more favorably than he was. Huyssen presented no evidence that First Union's calculation of his income available to pay his debts singled him out for unfavorable treatment. Huyssen presented no evidence that First Union used its established credit practices as a pretext to deny him a loan. This is not a case in which the lower courts' decisions conflict with any other precedent; instead, the plaintiff simply presented no evidence on any of the contested elements of his claim. The court of appeals and the district court followed established precedent in holding that Huyssen failed to present a case sufficient for submission to a jury. *See, e.g., Williams v. First Federal Savings & Loan Association*, 554 F. Supp. 449, *aff'd*, 697 F.2d 302 (2d Cir. 1982).

II. THIS CASE PRESENTS NO IMPORTANT ISSUES OF FEDERAL LAW.

Huyssen makes no claim that his petition presents any important question of federal law. The only conceivable important federal question in the petition is his belated Seventh Amendment issue. Huyssen seems to argue that because he was entitled to a jury trial, which he received, the Seventh Amendment requires submission of the case to the jury (Petition at 11-13). He apparently argues that even without presenting a *prima facie* case, he is entitled to have the jury speculate on some "natural inference" of discrimination, which he believes arose from the scanty evidence he did present. In essence, he argues that the Seventh Amendment prohibits a directed verdict under Rule 50 of the Federal Rules of Civil Procedure in any case in which a jury trial is properly demanded, regardless of any lack of evidence.

While this may have been an important issue of federal law long ago, the constitutionality of Rule 50 is now indisputable. *Galloway v. United States*, 319 U.S. 372 (1943); *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968). Huyssen has no reason to ask this Court to reconsider that established law.

III. THE PETITION SEEKS TO RAISE ISSUES NEVER PRESENTED TO THE TRIAL COURT AND AND NOT PRESERVED ON APPEAL.

In his pretrial stipulations, Huyssen elected to pursue a disparate treatment discrimination claim (Petition App. at 9h-10h). His theory was an utter failure. On appeal he decided to change his claims. He raised for the first time

in the court of appeals the disparate impact theory of discrimination under *Griggs v. Duke Power Co.* He argues that this Court should consider the "effects of [First Union's] practice," despite the fact that he established no record whatsoever about any such effects (Petition at 11). He neither pursued discovery nor presented evidence that First Union's credit standards somehow adversely affected any protected persons. To prevail on a disparate impact claim, he must prove the proposition that treating depreciation as taxable income discriminates against Germans or Christians. Evidence, not unsupported "natural inference," is required to meet this burden.

After trial, Huyssen decided to raise, for the first time, a "contract" claim. He once again makes a contract argument, without any support in the record, in this Court (Petition at 13-14). He claims that he was a "non-preparatory user" of First Union's lending manual, so it should be construed in his favor. The lending manual is an internal document. He is not a "user" at all. The court of appeals ignored his argument. This Court should too.

Finally, Huyssen failed to raise or preserve on appeal any claim that he was deprived of his Seventh Amendment right to a jury trial when the district court directed a verdict. He only mentioned the Seventh Amendment in passing in his court of appeals brief. Any lawyer should know that an issue must be presented below to be preserved on appeal, or to be presented for review in this Court. *Adickes v. Kress & Company*, 398 U.S. 144, 147, n. 2 (1970), *California v. Taylor*, 353 U.S. 553, 557, n. 2 (1957), *Tyrrel v. District of Columbia*, 243 U.S. 1 (1917). These belated issues do not justify a grant of certiorari.

Huyssen calls for "the most imaginative use" of ECOA; but his case rests on fantasy, not just imagination. He chose to pursue post-trial chicanery rather than pre-trial discovery. His unrelenting shout of "discrimination" is no substitute for facts or evidence. Despite years of discovery, Huyssen found nothing, because no discrimination occurred. He had every opportunity to be heard at trial, on his motion for a new trial, and in the court of appeals; but he has persuaded no one, other than himself, that he is a victim of discrimination. He has not one whit of evidence. First Union did not discriminate against him because he is a Christian or a German. The directed verdict was absolutely right. The denial of a new trial was absolutely right. The affirmance by the court of appeals was absolutely right. His dogged pursuit of this meritless claim must come to an end.

CONCLUSION

The Petition for a Writ of Certiorari is frivolous. It does not even attempt to raise an issue appropriate for certiorari under Rule 10. The Petition should, therefore, be denied.

Respectfully submitted,

FRANCIS C. CLARK
LEGAL DIVISION
FIRST UNION CORPORATION
Two First Union Center
301 S. Tryon Street
Charlotte, N.C. 28288-0630
(704) 374-6611

Counsel of Record

KELLY WILKINSON
KEAN, MILLER, HAWTHORNE,
D'ARMOND, MCCOWAN
& JARMAN
P. O. Box 3513
Baton Rouge, Louisiana 70821
(504) 387-0999

Counsel for Respondent

February 28, 1990